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IN THE

# Supreme Court of the United States

**October Term, 1950.**

**No. 161.**

CLAIR CONRAD,

*Petitioner,*

*v.*

PENNSYLVANIA RAILROAD COMPANY,

*Respondent.*

**No. 162.**

PASQUALE DAMIANO,

*Petitioner,*

*v.*

PENNSYLVANIA RAILROAD COMPANY, a Corporation,

*Respondent.*

## BRIEF AND APPENDIX FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### OPINIONS BELOW.

The opinion of the United States District Court is not reported. The opinion of the Court of Appeals for the Third Circuit is reported in 161 F. 2d 534. Certiorari was denied, 332 U. S. 762. The orders of the Court of Appeals for the Third Circuit, denying petitioners' motions in the nature of a bill of review, which were filed April 14, 1950, are not reported.

## JURISDICTION.

The jurisdiction of this Court is invoked under Section 1254 of Title 28 United States Code.

## QUESTION PRESENTED.

The sole question presented is whether the Court of Appeals should have granted petitioners' motions in the nature of bills of review asserting error on the face of the record where the error is said to exist only because, nearly three years after the decision of the Court of Appeals alleged to have been erroneous and more than two years after this Court denied a petition for certiorari, another court of appeals, on different facts, expressed disagreement with a statement of the law contained in the opinion of the Court of Appeals in the cases at bar.

## STATEMENT.

Petitioner Conrad brought a suit in the United States District Court for the Eastern District of Pennsylvania on June 12, 1946, under the Federal Employers' Liability Act, to recover for injuries alleged to have been incurred on October 12, 1941, while the petitioner was in the employ of the respondent.

Petitioner Damiano brought a similar suit in the same court on May 16, 1946, to recover for injuries alleged to have been incurred on November 4, 1942.

In one action (*Damiano,* R. 7), petitioner averred that the statute of limitations was tolled because the defendant induced the plaintiff "either fraudulently or by a mutual mistake of fact" to accept compensation under the state workmen's compensation law. In the other case (*Conrad,* R. 5-7), neither fraud nor the state compensation act was mentioned.

In the District Court, the respondent moved to dismiss each suit on the ground that it had been commenced more than three years after the cause of action had ac-

crued. The District Court granted the motion in both cases and dismissed the complaints, the Court of Appeals affirmed the judgments of dismissal, 161 F. 2d 534, and this Court denied certiorari on October 13, 1947, 332 U. S. 762. On March 9, 1950, petitioners filed motions in the nature of a bill of review, asserting that there was error apparent on the face of the record in that the Court of Appeals had held that fraud did not toll the statute of limitations. Although not averred in the motions, it appeared when they were presented to the Court of Appeals that they were based solely on the fact that, on December 3, 1949, in the case of *Scarborough v. Atlantic Coast Line R. Co.*, 178 F. 2d 253, cert. den. 339 U. S. 919, the Court of Appeals for the Fourth Circuit rendered an opinion, on facts quite different from those in the present cases, in which there was expressed disapproval of a statement of law contained in the opinion of the Court of Appeals for the Third Circuit in the present case.

There is no support in this record for the statements contained in the last two paragraphs on page 5 and the first paragraph on page 6 of the petition.

## ARGUMENT.

The petitions for certiorari should be denied. Petitioners' motions in the nature of bills of review are without merit. There is no error on the face of the record and there is no other justifiable ground for reopening this litigation nearly three years after the cases were dismissed by the Court of Appeals and more than two years after this Court denied certiorari.

The sole basis for the present petition and for the motions in the nature of a bill of review in the Court of Appeals is the fact that in *Scarborough v. Atlantic Coast Line R. Co.*, 178 F. 2d 253, cert. den. 339 U. S. 919, the Court of Appeals for the Fourth Circuit in considering a case that presented different facts from those involved in the cases at bar indicated a disagreement with views stated by the Court of Appeals for the Third Circuit in the instant cases.

This Court has consistently held that subsequent decisions, whether in the same or a higher court, "will not lay the foundation for a bill of review for errors of law apparent, or for new matter *in pais* discovered since the decree and probably requiring a different result," **Scotten v. Littlefield, 235 U. S. 407, 411 (1914)**, a case cited with approval in **Simmons Co. v. Grier Bros. Co., 258 U. S. 82, 88 (1922)**.

The petition in this case suggests no new facts but presents the same arguments that were previously made before the Court of Appeals and in the petition for certiorari filed in this case in 1947. In effect the present petition is nothing more than a petition for rehearing, filed out of time, in which petitioners seek to supplement their original arguments by reference to the *Scarborough* case. A petition so filed would not merit serious consideration (Rule 33, Rules of the Supreme Court; Rule 33, Rules of the Court of Appeals for the Third Circuit) and petitioners are entitled to no greater consideration merely because their pe-

titions are cloaked in the guise of motions in the nature of a bill of review.

Rule 60 (b) of the Federal Rules of Civil Procedure (respondent's appendix p. 9) abolishes bills of review and bills in the nature of a bill of review, and prescribes the procedural substitute for those remedies. The motions here involved are said to be made under that rule. But, under Rule 60 (b), such a motion must be made within a year after judgment, if based on mistake, newly discovered evidence, or fraud; and, where the motion is based on the fact that the judgment is void, has been satisfied, or there are other reasons justifying relief, the motion must be made within a reasonable period of time. Petitioners aver error apparent on the face of the record, but the only error claimed is error of law in that the Court of Appeals for the Third Circuit expressed an opinion different from that later expressed, under different facts, by the Court of Appeals for the Fourth Circuit. This amounts to nothing more than a claim of "mistake", from which relief must be sought within one year after judgment. The alleged fraud to which petitioners refer is not fraud in connection with the judgment, but, even if it were, relief from fraud must be sought within a year. Since relief from mistake (or error of law) is expressly covered by the one-year limitation contained in Rule 60 (b), there can be no application of the sixth, or catch-all, clause of the Rule, authorizing relief from judgments for "any other reason", particularly in the absence of extraordinary circumstances. See *Klapprott v. United States,* 335 U. S. 601, 613, 614, 615 (1949). And, even if the sixth clause of Rule 60 (b) were applicable, it could not be said that petitioners acted within a reasonable time.

Petitioners excuse their laches by contending that the alleged error of law was not apparent until the decision in the *Scarborough* case and that they acted promptly after that decision was reported. Actually the *Scarborough* case is merely the opinion of another court of appeals on dif-

ferent facts, where, as in the instant case, certiorari was denied, and the difference in facts explains the different result. If error was not apparent to this Court when petitioners' original application for certiorari was presented or to counsel for the petitioners for more than two years after certiorari was denied, the *Scarborough* case does not now demonstrate any error "apparent on the face of the record" requiring relief in the instant case.

Even if there were error apparent, in the instant case, the remedy the petitioners seek would be subject to the equitable defense of laches as well as the express limitation of Rule 60 (b). **Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207 (1889).** Certainly, a delay of two and one half years after the commission of "error apparent" constitutes laches and exceeds the reasonable time allowance in Rule 60 (b) for cases not covered by the one-year limitation provided in that Rule. Furthermore, the motions were denied in the exercise of a sound discretion in the court below, no abuse of which has been shown. **Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U. S. 238, 248 (1944).**

Were petitioners' contention to prevail, a review of final judgments could be had at any time if some subsequent opinion expressed a view differing from that expressed in an earlier case, and, if petitioners may have the relief sought three years after the decision objected to, they may have it ten or even twenty years later.

Petitioners are merely seeking to re-argue a case that was decided by the Court of Appeals three years ago and which, more than two years ago, this Court declined to review. The case was terminated then. It cannot be revived simply because another court, upon a different set of facts, reached an apparently contrary conclusion in respect of one of the issues of law originally presented to the Court of Appeals in these cases.

## CONCLUSION.

It is respectfully submitted, therefore, that the petition for certiorari should be denied.

Respectfully submitted,

PHILIP PRICE,
HUGH B. COX,
*Attorneys for Respondent.*

## RESPONDENT'S APPENDIX.

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## RULE 60 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

**"Rule 60. Relief from Judgment or Order.**

(a) CLERICAL MISTAKES. . . .

(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually per-

sonally notified as provided in Title 28, U. S. C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill or review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."